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IN THE

Supreme Court of the United States

No. 72-1700

ROBERT V. HARMASH and JAMES P. KEHOE,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1972

No. .....

ROBERT V. HARMASH and JAMES P. KEHOE,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, James P. Kehoe and Robert V. Harmash, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in this proceeding on the 18th day of April, 1973.

OPINION

An opinion was rendered by the United States Court of Appeals for the Second Circuit which is reproduced in the appendix. No opinion was rendered by the United States District Court.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was rendered on the 18th day of April, 1973. A timely application for an extension of time in which to file the petition for certiorari was made on the 9th day of May, 1973 and granted by Mr. Justice Marshall, and this petition for certiorari was filed within the thirty day extended period.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. If it is deemed that Congress may impose penalties for the possession, use or the distribution of marijuana, its classification in Schedule I of the Act, together with heroin, the opiates and LSD is both irrational and arbitrary.

2. The Criminalization of marijuana under Federal law is unconstitutional, invading as it does and must the individual's right to do as he pleases provided that he does not interfere with the rights of his neighbor or society. The right to possess

and use marijuana has little meaning unless one has the right to acquire it, and hence proscription of sale cannot be reconciled with the right to possess and use.

The petitioner, Robert V. Harmash, was convicted in the United States District Court for the Eastern District of New York (Rayfiel, J.) of possessing marijuana with an intent to distribute in violation of Title 21, United States Code, Sections 841 and 846 and a conspiracy in violation of Title 18, United States Code, Section 846. He was sentenced to serve a term of three and one half years, pay a fine of $2,500.00 and serve a period of three years on special parole.

The petitioner, James P. Kehoe, acquitted of the conspiracy and convicted of the substantive count, was sentenced to serve a term of two and one-half years, pay a fine of $2,500.00 and to serve a period of three years on special parole. The convictions were affirmed by the United States Court of Appeals for the Second Circuit in an unanimous opinion decided April 18, 1973.

Robert V. Harmash is presently imprisoned and James P. Kehoe is at liberty on bond.

STATEMENT OF FACTS

The petitioners together with one John C. Kiffer were arrested on December 1, 1971 in the County of Queens, City and State of New York by Federal agents attached to the Bureau of Narcotics and Dangerous drugs. Kiffer's arrest occurred while he was in the process of delivering a quantity of marijuana to a Government informant, a Norman Biddle Smith.

The petitioners were found in a warehouse where there was stored approximately two tons of marijuana. A more detailed version of the facts serves no purpose as petitioners have not questioned the sufficiency of the evidence in the Courts below.

All three were indicted for the possession of marijuana with intent to distribute, in violation of 21 U.S.C. Section 841(a)(1), and conspiracy, in violation of 21 U.S.C. Section 846.

They were tried in October of 1972 before the Hon. Leo F. Rayfiel and a jury in the United States District Court for the Eastern District of New York. Kiffer and Harmash were convicted of both counts and Kehoe was convicted on the possession count.

A post conviction hearing was held to determine the constitutionality of those sections of the statute which prohibited and made criminal the possession of marijuana. The testimony of Dr. Grinspoon is relied upon. Numerals in brackets refer to pages in the minutes of the hearing.

A hearing was held during the proceedings at which expert scientific evidence was presented to support the defendants' contentions that there were no rational basis for the inclusion of marijuana among the schedules of illicit drugs contained in 21 U.S.C. 801 et seq., and that there is, in any event no rational basis for including marijuana as a schedule I drug, along with heroin, the opiates and L.S.D.

Dr. Lester Grinspoon, a medical doctor, a psychiatrist, and

professor at Harvard Medical School, testified that he made extensive studies of marijuana, and is the author of the book, Marijuana Reconsidered [9-25].

Dr. Grinspoon testified that marijuana was known for its medical uses since 2736 B.C., and was an important medicinal in China and India throughout recorded history. It came to the attention of the West primarily through the work of a British surgeon in 1839 who observed its successful medical applications in India [26-27]. During the next 100 years more than 100 scientific papers were published in the West on the medical uses of marijuana, describing in particular its application as an analgesic or pain reliver, its use to treat convulsive disorders, its use in bronchial asthma cases, and its great success in the alleviation of menstrual pains [26-30]. Up until 1937, marijuana was sold in the United States without prescription as a medicine [30]. Its decline in medical usage was caused by the discovery of more effective drugs in the 20th century. Thus as an analgesic, marijuana was replaced by opiates which were water soluble and could be used in syringes [31]. Other milder and more efficient analgesics were also found, especially barbiturates [31]. Furthermore, when marijuana was proscribed by the Marijuana Tax Act of 1937, the tax and the requirement of filling out forms made it easier for doctors to turn to other medicines. Marijana then disappeared from the United States Pharmacopia and National Formulary, the standard reference works for physicians, in 1937 [31, 53-54]. However, the present law does not proscribe the use of marijuana on prescription [62-63], and medical research has again found uses for it, specifically in treating glaucoma, for hypertension, and as an anti-depressant [35].

Dr. Grinspoon described the effects of smoking marijuana. It produces a sense of well-being, a pleasant warm feeling, "a

nice feeling." "It usually involves a sense of conviviality, wanting to share with other people. It usually involves a ... sense of the ridiculous. Things under ordinary circumstances, that wouldn't strike us as being funny, seem hilarious. It involves an appreciation for such things as music and graphic art, which usually aren't available to a person. That a person very often has the sense that he can hear something in a piece of music which he has never been able to feel before or see something in art that he has never been able to feel before. It usually involves enhancement of appetite. Some things that one would not ordinarily eat become a culinary delight. There is a feeling of sleepiness and a quiet comfortable, and quiet sleep, and does not result in any hangover effect" [33, 65-66].

Marijuana does not have a tolerance point, such as other drugs do. That is, with other drugs, the more one takes, the more one needs to recreate the initial effect. With marijuana, people who have smoked it, need less to achieve the same "high" in the future [33-34]. Marijuana is relatively less harmful than alcohol or tobacco. Alcohol, for instance, causes tissue damage, damage to the liver, brain and cardiovascular system [34, 40]. In some ways, marijuana is less harmful than aspirin which results in 400 to 1,000 deaths a year [35]. Marijuana has a remarkably low toxicity [38].

Unlike heroin, marijuana is not a narcotic. It is not addictive. "There is simply no question about that" [36, 52]. It does not contribute as a stepping stone to harder drugs [36], and does not lead to crimes or sexual acts [39].

Physiologically, marijuana has two effects. One is an increase in pulse rate which, however, is less than the increase when a person plays a set of tennis. The other is that the eyes

become bloodshot, but this is related only to the actual "high", and disappears immediately afterwards [41].

Regarding a potential for abuse, the Doctor testified that all drugs may be abused. Marijuana causes no harm to the individual, [38-39]. The only potential for abuse may be in some people who use it a lot. But these persons "are going to adduce some psychoactive drug in any event. . . they feel compelled to do it because they have a personality disorder or have a great deal of depression and turn to a psychoactive drug as a way of dealing with this pain that comes from inside of them. If they don't abuse one psychoactive drug, they are going to abuse another" [39]. In this connection, statistics show that only about 2% of the people who smoke marijuana, smoke it in abusive quantities, while 9-10% of people who drink will become alcoholics [39]. Any psychological dependency is not linked to marijuana per se, but to the personality of the individual using it [43]. That is, one is less dependent on marijuana cigarettes than on regular cigarettes [42], and people who smoke marijuana, even frequently, can easily stop forever [43]. Moreover, the witness agreed with the factual conclusion of the Shafer Report[1] that "there is no evidence of damage to a heavy marijuana smoker" [47].

Dr. Grinspoon did not agree with the Shafer report's conclusion that marijuana smoking was a fad and will disappear [47]. Moreover, while the Doctor agreed with the Shafer report that private use in the home should not be criminal, he disagreed with keeping criminal penalties for people who

1. Officially, the Report of the *National Commission on Marijuana and Drug Abuse* established under the Drug Abuse Prevention and Control Act of 1970. A copy of the report was received in evidence at the hearing (44).

distribute marijuana. This is because statistics show that all sellers use marijuana and approximately half of the users distribute it [47-48]. And there are more than 10,000,000 users in the United States [48]. A strict prohibition, the doctor believes, has not and will not work, and it is better to accept the reality and control marijuana [50].

Giving his expert opinion, Dr. Grinspoon did not find any rationale or scientific basis for classifying marijuana in schedule I along with such drugs as heroin, morphine, and L.S.D. [52]. As to the criteria for schedule I, Doctor Grinspoon testified that there is no lack of safety for use of marijuana under medical supervision [54]. It could be safely prescribed [69].

It was stipulated between counsel, that if called, the following experts would give the same or similar opinions as Dr. Grinspoon: Dr. Norman Zinberg, Harvard Medical School; Dr. Eric Goode, State University of New York at Stoneybrook; Professor John Kaplan, Stanford University Law School; Dr. Richard Pillard, Boston University Medical School; Dr. Carl Salzman, Harvard Medical School and Massachusetts Mental Health Center [82-83].

It was also stipulated that if the Government called Dr. Forest S. Tennant, Jr., he would testify to what was contained in his affidavit submitted to the court [71-81].

I

THE CLASSIFICATION OF MARIJUANA IN SCHEDULE I IS IRRATIONAL, ARBITRARY AND CONSTITUTIONALLY UNSOUND

Robert V. Harmash and James P. Kehoe have been judged and found wanting. Their immediate future is assured. Their crime was the possession of two tons of marijuana, to be used to satisfy the growing demands of millions of law abiding Americans, victims of a prohibitory statute that "incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America." *United States v. Kiffer et al, F 2d slip. op. 2912 (2nd Cir., 1973).*

This prohibition of marijuana has been starkly called into question in legal opinions and by the report of a Presidential Commission which report was condemned by The Executive before its issuance. It is essential that marijuana be "demythologized" and "desymbolized" because it is a plant that has tempted palates from fig leaves to dinner jackets. Those who oppose its use, possession and sale have created numerous bugaboos. Its users have luridly been caricatured as drooling rapists, licentitous criminals and raving maniacs. Marijuana, it has been urged, inevitably leads the smoker to the unrestrained use of heroin. Administrative empires have been created to control it. Yet its use increases in direct proportion to the increase of the forces arrayed against it. In a society addicted to the use of tobacco and alcohol, there cannot be a rational reason for the criminal prohibition of the use and sale of "pot.', save that of the "Generation Gap" and prejudice.

The petitioners, like many of their generation, have adopted attitudes, values and lifestyles at variance with those of their betters, whose wisdom may be questioned but whose power is known. This clash between youth and age, between the powerless and the powerful, is at the core of the problem. A substantial segment of this young and sometimes vocal generation, has been barred from effectively asserting its grievances, real or imagined. Access to the throne has been denied. Speech is meaningless when it wilfully is not heard. Commissions have been appointed. Their findings have been ignored. Virtue is the password and manipulation the order of the day.

A generation, glowering at the sidelines, has, on occasion, burst forward into violence, then relapsed into schizoid withdrawal. Some have fled and others have found solace in drugs. Many have found death on alien ground too small to contain the fallen. Amnesty is an obscenity and understanding, weakness. Slogans, symbols and rhetoric offer no solace.[2] Concerned citizens fear for the safety of the Republic. . Each day's headlines reveal political atrocities, Vietnam, Cambodia, I.T.T. and Watergate. "Marijuana, in fact, has become a symbol of a host of major conflicts in our society each of which exacerbates any attempt at a rational solution to the problem." J. Kaplan, Marijuana-The New Prohibition 3 (1970)

Relief should come from the courts. The United States is a signatory of the Single Convention on Narcotic Drugs, March 30, 1961 [1967] 18 UST 1407. T.I.A.S. No. 6289 (ratified by United States in 1967). The Director of the Bureau of Narcotics

2. Recently the Reverend Billy Graham seriously suggested castration as the solution to sex crimes. The American Bar Association has adopted the views expressed herein.

and Dangerous Drugs - the Attorney General's designated agent for this purpose (See Sec. 811 (d) of 21 U.S.C.) adopted the position that marijuana is covered by the Convention. He has refused to reconsider the marijuana classification pursuant to a petition of an interested party.[3] *37 Fed. Reg. 18907-98 (1972), appeal pending sub. nom. National Organization for the Reform of Marijuana Laws v. Ingersoll, Civil No. 72-1854 (D.C. Cir.).* Marijuana, then under existing treaty, was required to be interdicted, regardless of Congressional findings, rational or irrational. Not only is administrative relief a fiction, but the validity of Congressional findings respecting marijuana is placed in question. If the Convention mandated the interdiction of marijuana, then Congress was duty bound to comply and its marijuana hearings might have constituted window dressing. Its prohibition then was inevitable.

21 U.S.C. Section 812 classifies prohibited drugs into five schedules, differentiated by their current medical use and their "potential for abuse" Penalties for possession or distribution are determined by the schedule within which the drug has been

3. Section 811 (d) provides: If control is required by United States obligations under international treaties, conventions or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812 (b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

classified. (21 U.S.C. Section 841) Schedules I and II contain narcotic and non-narcotic drugs; penalties for the former permit a maximum of fifteen years and for the latter five years. Drugs contained in Schedule III call for a maximum of five years and those in Schedule IV for a maximum of three years. A one year maximum may be imposed for those drugs listed in Schedule V.

Marijuana is not classified as a narcotic. (21 U.S.C. Section 802 (15) (16). However it is listed in Schedule I with the opiates, with heroin and L.S.D. and other potent hallucinogens. This classification of marijuana in Schedule I is not rational in the light of present scientific and medical information or the scientific conflict. Marijuana is harmless when compared with heroin or the powerful hallucinogens. Indeed it is not as harmful as those household staples, alcohol and tobacco.

A substance to be categorized in Schedule I must have a "high potential for abuse", have no currently accepted medical use for treatment in the United States and it must be shown that there is "a lack of accepted safety for use of the drug..... under medical supervision." (21 U.S.C. Section 812(b)

Marijuana has been in medical use from 2736 B.C. to 1937 A.D. when Congress imposed a substantial tax upon marijuana which compelled the use of substitutes and ultimately eliminated it as a drug of choice from the Pharmacopia. However, there has been a resurgence in the medical use of marijuana. It has been prescribed for the treatment of glaucoma, hypertension and as an anti-depressant. [35][4] Dr. Grinspoon of the Harvard Medical School categorically testified that there is no lack of

4. Refers to pages in the Record on Appeal.

safety in its medical use and that it can be prescribed with safety. [54, 69] Scientific evidence clearly indicates that marijuana does not belong in a category of substances which have a high potential for abuse, whatever that means. Presumably over indulgence in any substance or any drug may lead to abuse and often does. Thus from 9-10% of drinkers abuse alcohol [39] though estimates indicate only 2% of marijuana smokers may be deemed abusive smokers. The Shafer Report clearly states that among adults no abuse problem exists. Marijuana's widespread use by a "considerable number of middle class individuals" including many in the professions, is primarily for the "facilitation of social interaction (much like the adult use of alcohol in social gatherings)" and for "recreational purposes (Shafer Report, pp 92-93) Significantly "the adult recreational user is not generally viewed as a significant social problem" [id. p. 92].[5]

To categorize marijuana with some opiates, with heroin and with the hallucinogens, is to pragmatically equate its

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5. While there naturally is a greater potential for abuse among youth than among adults, since they lack the maturity and sophistication to deal with such matters, there are no substantial legal and enforcement problems in controlling the distribution and use among the young. The law often makes a rational distinction based upon age, allowing adults to follow a course of conduct or use substances prohibited to youth. Consequently, as applied to adults, the general ban on marijuana must be or should be considered in reference to the adult violator. For what is arbitrary and irrational in terms of the adult, might be reasonable when applied to teenagers. Marijuana could be banned in relation to the young but made permissible for adults, in the same manner as alcohol and driving. By the same terms, the potential for abuse should be measured in terms of adult abuse and not youthful overindulgence, since the law also proscribes adult possession and sale.

potential for abuse with the known "hard drugs". Marijuana is not addictive. It has no point of tolerance, demanding greater use to achieve the initial effect and its use can easily be reliquished. Obviously the potential for abuse in a substance which does not require continued use, is significantly less than the other drugs. Cigarette use may be addictive. At best it creates an overwhelming habit which many smokers find impossible to break. Indeed alcohol and tobacco, which readily and easily fit into Schedules I and II, are easily available and frequently indulged in emphasizing strikingly the irrationality of heavily penalizing the possession of marijuana, an infinitely less harmful substance. Marijuana, per se, has little potential for abuse because of its non-addictive and mildly pleasant effects, any abuse is attributable to the personality of the user. The heroin addict must abuse that narcotic drug. His use cannot be casual. The addictive qualities of the drug demand this. Those who abuse marijuana are those who would abuse any other drug or substance were marijuana not available. In effect it is not marijuana that has the potential for abuse but rather the emotional or psychologically crippled smokers who abuse it.

It is apparent that because adult users, rarely, if ever, abuse marijuana but confine their use to social and recreational occasions, that marijuana does not have a high potential for abuse. Aspirin, as testified to by Dr. Grinspoon, statistically has a higher potential for abuse than marijuana. Thus, there is no scientifically acceptable rationale for placing marijuana in Schedule I. [52].

The United States Court of Appeals for the Second Circuit was compelled to forego the provisions of 21 U.S.C. 812(b) in order to sustain marijuana's classification in Schedule I. The Court relied on the recommendation made by the Department of

Health, Education and Welfare to the Congress that "marijuana be retained in Schedule I at least until the completion of certain studies now underway to" determine the physical and psychological dependency effects of the drug. See H.R. Report, supra at 4579, 4629-30. Relying on the remarks of Senator Hruska (see 116 Cong. Rec. 797 daily ed. Jan. 28, 1970) Judge Feinberg wrote "Apparently the potential for abuse and the absence of significant medical value were the determining grounds for placement of marijuana in the first schedule." (*United States v Kiffer et al, slip op. p. 2920*)

The significant lack of medical use was due to a burdensome tax placed upon marijuana by the Congress apparently at the request of the counterpart of today's Bureau of Narcotics and Dangerous Drugs. It is unquestioned that the relaxation of this relentless attitude against marijuana has led to medical experimentation and greater medical use at present. The Court of Appeals conceded that "there is little or no basis for concluding that marijuana is as dangerous a substance as some of the other drugs included in Schedule I." (*United States v. Kiffer et al, supra, p. 2921*)

The fact that there is a significant difference in penalties between marijuana possession and heroin possession does not detract from the argument that marijuana's present classification is an irrational one. The respondents see a significant difference between two and one half years and three and one half years of confinement as opposed to one year.

The presence of a corrective mechanism within the statute offers no solace to one who faces a substantial sentence that is both cruel, inhuman and socially erroneous. Assuming medical ferment and disagreement respecting marijuana's potential for

abuse and its lack of medical use, would its classification in Schedule V be destructive to an orderly society, particularly when the Government, frowning as it does on the use of tobacco and alcohol, nonetheless promotes its use through its farm subsidies. Obviously the health and welfare of the nation is not a factor, though it should be. If one is to err on the basis of ignorance, its best to err with some compassion.

The many cases of barbiturate poisoning caused by drugs contained in Schedule IV are silent testimony that these drugs are infinitely more dangerous and have a greater potential for abuse than marijuana. Significantly in *People v. McCabe, Ill. 2d , 275 N.E. 2d 407 (1971)*, the Supreme Court of the State of Illinois considered whether marijuana was properly categorized in the State's Narcotic Drug Act. Marijuana was classified with cocaine and heroin and there was imposed, for its possession, a penalty of ten years. It was argued that marijuana properly belonged in the State's Drug Abuse Control Act with the barbiturates. The Court concluded that it should be placed with the barbiturates though the barbiturates were deemed more deadly and dangerous. The Court wrote

> "Frequent use of the barbiturates at high dosage levels leads invariably to the development of physical dependence, tolerance and severe withdrawal symptoms, similar to those associated with heroin use. The effects of barbiturate intoxication resemble those of alcoholic intoxication. There is a general sluggishness, difficulty in concentrating and thinking, speech impairment, memory lapse, faulty judgment and exaggeration of basic personality traits. Irritability and quarrelsomeness are common. Hostile and paranoid ideas as well as suicidal tendencies can occur. Barbiturates are said to be the most frequently used chemical in suicides in the United States. Accidental

deaths from an overdose can occur. There is a clear association between barbituric intoxication and accidents and traffic fatalities. The drug can depress a wide range of functions, including the nerves, skeletal muscles and the cardiac muscle. Barbiturates are frequently used by heroin addicts to boost the effect of weak heroin." (275 N.E. 2d at 411, *supra*).

It is the height of absurdity for the Federal Schedules to list marijuana with the opiates, heroin and the hallucinogenics. It is more rational, though not a truism, to place it with the barbiturates, though they be potentially more abusive and pose an infinitely greater threat. Consistency degrees that marijuana be listed in Schedule V.[6]

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6. Though 21 U.S.C. Section 811 provides for the addition, subtraction or transfer of substances by the Attorney General from one Schedule to another, the present listing of marijuana reflects the original enactment whose basis rested on doubt, indifference and insufficient knowledge. Whether, and this is presently highly doubtful, it may or can be corrected by the appropriate agency at a future date is not germane to the issue raised here.

The petitioners and the Court of Appeals are in agreement. The hearing, conducted as it was after a jury verdict of conviction, was insufficient for present purposes. Petitioners, tactically were compelled to accept the finding of the Government's expert while at the same time their expert was subjected to cross examination.

II

THAT PORTION OF THE STATUTE THAT CRIMINALIZES THE POSSESSION, USE AND SALE OF MARIJUANA IS UNCONSTITUTIONAL.

The United States Court of Appeals for the Second Circuit held that the respondents did not have the constitutional right to possess marijuana for commercial gain. The Court recognized the distinction between private possession leading to private use, and possession, whose intent was distribution for profit. It resorted to numerous authorities that raised the spectre of doubt regarding the safe use of the substance over short or prolonged periods of use. The Court recognized that an extensive degree of misinformation existed with regard to marijuana. Nonetheless it concluded that it could not afford relief and that the ultimate resort must be to the Congress. Aware of a possible weakness in its argument, the Court articulated the doctrine that "If Congress decides to regulate or prohibit some harmful substance. It is not thereby constitutionally compelled to regulate or prohibit all." *United States v. Kiffer et al, F 2d* . (Slip Op. p. 2918) In this limited sense the Court in fact recognized the right of the individual to control his own body and to indulge in private or public in what may be publicly condemned or deemed immoral or unacceptable to society at large. Congressional reluctance is oft determined by constitutional limitations or public concern and opinion and in such instances the deleterious is often ignored.

A generation has discovered what it believes to be a salubrious plant that adds joy to living, sharpens the senses and is a most pleasurable experience. To an extent it has rejected the martini and tobacco. If the Court of Appeals had

substituted, in its opinion, alcohol or tobacco for the word marijuana, its opinion would reach the same result. Obviously health and welfare are not the concerns that entered into either Congressional or Judicial determinations.

Very little is known about the effects of marijuana, either short or long term. This has been conceded.

> "Congress listed marijuana in Schedule I principally on the recommendation of HEW, which urged" that marijuana be retained in Schedule I at least until the completion of certain studies now underway to "determine the physical and psychological dependency effects of the drug." (*U.S. v Kiffer et al.*, (supra, p. 2920)

In effect interdiction occurred with the imposition of substantial criminal penalties against a substance which Congress knew very little about and knew little of its harmful or beneficial effects. It is suggested that such activity borders on the irrational.

Recently two Supreme Court of the United States decisions reinforced the idea of the right of the individual to control his body and to indulge in private what may be condemned in public. In *Griswold v. Connecticut, 381 U.S. 479 (1965)* birth control devices and their use could not be constitutionally prohibited. A right to privacy was recognized and granted under the umbrellas of the First, Third, Fourth, Fifth and Ninth Amendments. The home was recognized as a "zone of privacy" under these amendments. Governmental interference into the marriage relationship was described as "repulsive to the notions of privacy" (381 U.S. 485-6, *supra*).

Again in *Stanley v. Georgia, 394 U.S. 557 (1969)* the Court sanctioned the private possession of obscene materials allowing the State the power to regulate obscenity precluding this regulation into the confines of the home. To overcome these concepts of privacy, a constitutional amendment was required to effect Prohibition. In 1915 the Supreme Court of the State of Kentucky struck down as unconstitutional a State prohibition law:

> "It is not within the competency of government to invade the privacy of the citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty in the exercise of which will not directly injure society. . . The right to use liquor for one's own comfort – if they use it without direct injury to the public, is one of the citizen's natural and inalienable rights. (Commonwealth v. Campbell, – Ky. –, 172 S.W. 110 (1915)

Again, divorcing the heat and the prejudice attached to this alien plant, a plant whose origins and use predate recorded history, and substituting the word marijuana for liquor, should not the result be the same? The right to use marijuana is natural and inalienable. Matters of taste, good or bad, are often protected from government interference. Buchanan v. Batchelor, 308 F.S. 729, (N.D. Tex. 1970) vac. on other gds., 401 U.S. 989 (consensual sodomy); Roberts v. Clement, 252 F.S. 835, 848-850 (D.C. Tenn) (nudism); Griffin v. Tatum, 300 F.S. 60, 62 (D.C. Ala. 1969) (hair regulation); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) (receiving communist literature through the mail); Breen v. Kahl, 296 F.S. 702, 705-706 (D.C. Wis. 1969) (hair regulation); Roe v. Wade, 314 F.S. 1217 (D.C. Tex. 1970) (abortion); Doe v. Bolton, 319 F.S. 1048 (D.C. Ga. 1970) (abortion); Babbitz v. McCann, 310

F.S. 293 (D.C. Wis. 1970) vac. on other gds. 402 U.S. 903 (abortion); Doe v. Scott, 321 F.S. 1385 (D.C. Ill. 1971) (abortion); People v. Belous, 71 Cal. 2d 954, 458 P. 2d 194 (1969) (abortion).

Three recent cases, each concerning marijuana, evidence a return to reason and an acceptance that the use and sale of the substance bordered on the inalienable and the unstoppable. In *People v. Sinclair,* Mich.,' 194 N.W. 2d 878 (1972) the defendant was convicted for possessing two marijuana cigarettes. . He was sentenced to 9½ to 10 years. The Michigan statute was struck down for mandating cruel and unusual punishment. Two members of the Court, Judges Swainson and Wiliams, opined that the classification of marijuana by statute as a narcotic denied the equal protection of the laws because it was an unreasonable classification. Judge Kavanaugh, concurring, went further declaring the prohibition of marijuana unconstitutional.

> "I find that our statute violates the Federal and State Constitution in that it is impermissible intrusion on the fundamental rights to liberty and the pursuit of happiness, and is an unwarranted interference with the right to possess and use private property.
>
> "As I understand our constitutional concept of government, an individual is free to do whatever he pleases, so long as he does not interfere with the rights of his neighbor or of society and no government – state or federal – has been ceded the authority to interfere with that freedom....."

"Big Brother cannot, in the name of *public health*, dictate to anyone what he can eat or drink or smoke in the privacy of his own home.

"In my view when the legislature proscribed the possession and private use of marijuana as a *Public* health measure it did so unconstitutionally." 194 N.W. 2d at 896.

Simultaneously, the same Court decided *People v. Lorentzen, Mich. , 194 N.W. 2d 827 (1972).* The defendant was convicted of the sale of marijuana and received the mandatory minimum sentence of twenty years. The penalty was deemed to be cruel and unusual punishment. In a separate concurrence, Judge Kavanagh expanded on SINCLAIR in language most appropriate to the present case.

"In People v. Sinclair – I stated the conviction that the government has no constitutional authority to proscribe the possession and private use of marijuana. The right to possess and use something, however, has little meaning unless one also has the right to acquire it, hence *proscription* of sale cannot be reconciled with the right to possess and use."

"It may be that some legitimate public interest may be served by the *regulation* of traffic in marijuana, but a statute which absolutely forbids the sale of marijuana is as offensive to the right of privacy and the pursuit of happiness as a statute which forbids its possession and use." (194 N.W. 2d at 834, *supra*)

The Hawaii Supreme Court considered the question of a state statute that listed marijuana as a narcotic. The Court concluded that it was not because the statute treated the plant

as a non-narcotic. The conviction was affirmed, a majority of the Court expressed the opinion that the prohibition of marijuana was unconstitutional (*Hawaii v. Kantner, Haw. 493P 2d 306 (1972)* Judge Abe, while affirming, was compelled to write:

> "One has a fundamental right of liberty to make a fool of himself as long as his act does not endanger others, and that the statute may regulate the conduct of a person under pain of criminal punishment only when his actions affect the general welfare – that is, where others are harmed or likely to be harmed. Thus, I believe that right to the 'enjoyment of life, liberty and the pursuit of happiness' includes smoking marijuana, and one's right to smoke marijuana may not be prohibited or curtailed unless such smoking affects the general welfare." (493 P 2d at 312, *supra*)

Assuming that marijuana, like alcohol and tobacco, could be shown to be harmful to the user, such a finding "does not authorize the State under its police power to prohibit its use under threat of punishment..... the State must prove that the use of marijuana is not only harmful to the user but also to the general public before it can prohibit its use." (493 P 2d at 313, *supra*)

Judge Levinson, in dissent, held that the due process clause of the Federal Constitution grants "a person... a constitutionally protected right purposely to induce in himself, in private a mild hallucinatory mental condition through the use of marijuana." Primarily, the right of privacy, recognized in *Griswold v. Connecticutt*, "encompasses more than just freedom from government surveillance. It guarantees to the

individual the full measure of control over his own personality consistent with the security of himself and others. This freedom to choose one's own plan of life is essential to the pursuit of happiness and the enjoyment of life... In the instant case, the State's infringement upon this right of personal autonomy becomes apparent when one understands the nature of marijuana and the reasons for its use." (493 P 2d at 315, *supra*) The Judge expanded with the recognition that marijuana is not addictive nor does it render the smoker dependent. Judge Levinson found that the State had failed to prove that private, personal use of marijuana harms either the user or society. In this regard, the Judge recalled testimony that some heavy users exhibited "an antimotivational syndrome" in which he lost "interest in things that are traditionally important to the 'older generation' " The Judge concluded "this effect cannot serve as a valid basis for legislation. A society which cherishes individual freedom may not justify regulations solely on the need to maintain the existing order of moral, economic and social values." (493 P 2d at 316, *supra*).

The State argued that the use of marijuana contributes to the commission of crimes. Judge Levinson felt that such proof was most speculative, citing *Stanley v. Georgia,* where this argument was rejected as a rationale for the regulation of personal use.

Since the State failed to establish individual or societal effects from the use of marijuana, Judge Levinson decided:

> "Where the state endeavors to intrude into the individual's private life and regulate conduct having no public significance, it is the duty of the courts to offer a haven of refuge where the individual may secure vindication of his

right to be let alone." (493 P 2d at 317-8, *supra*)

Judge Kobayashi, another dissenter, held that while marijuana may be regulated, as tobacco and alcohol is, the establishment of criminal penalties "is unreasonable and unconstitutional in violation of the due process and equal protection clauses". (493 P 2d at 318, *supra*)

Noting that marijuana is less harmful than alcohol, the Judge concluded:

> "Until legitimate research indicates otherwise, the harm created by placing a criminal sanction on the activities of a significant percentage of our population who would otherwise be law abiding citizens far outweighs any present benefit to be derived from the effects of classifying marijuana as a narcotic. There is no logical or otherwise rational reason for our society, on the basis of a law that has little or no merit in its application, to continue to make criminals out of and consequently alienate the youth of today. The use of marijuana does not cause the social ills that the legislature has attempted to guard against." (493 P 2d at 320, *supra*).

> "It is suggested that a more reasonable and rational approach in this area would be to regulate marijuana in a manner similar to that of alcohol and tobacco. In this way the abusive use of marijuana, not its reasonable use, would be given criminal sanctions. Such a change of the law in this area would instill the respect of society that is needed for the preservation of criminal justice and prospectively decrease the criminalization of our younger generation." (493 P 2d at 320, *supra*)

Little needs to be added to the comprehensive views expressed by the judges in Michigan and Hawaii. As remarked in

Griswold, "where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling" (381 U.S. at 504, *supra); Bates v. Little Rock,* 361 U.S. 516, 524 (1960); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969)

Marijuana presents no countervailing interest, compelling or otherwise. If the mythology respecting marijuana is believed, such interest might exist. However, it is apparent that scientific evaluation has now reached a stage where it is obvious that "the dangers" of marijuana are minimal if non-existent. When compared with "the dangers" posed by alcohol and tobacco, marijuana is a boon.

Marijuana has become the victim of hysteria misinformation and perhaps political opportunism. Its ban is grounded in ignorance, fear and confusion. None of these rise to a rationale that meets constitutional standards.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 576—September Term, 1972.

(Argued January 30, 1973 Decided April 18, 1973.)

Docket No. 72-2263

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN C. KIFFER, JAMES P. KEHOE, and ROBERT V. HARMASH,

Appellants.

Before:

ANDERSON, FEINBERG and MULLIGAN,

Circuit Judges.

Appeal from marihuana convictions under 21 U.S.C. §§ 841(a), 846 in United States District Court for the Eastern District of New York, Leo F. Rayfiel, *J.*, on grounds of unconstitutionality of marihuana prohibition and of its classification as Schedule I drug.

Affirmed.

ALAN SCRIBNER, New York, N.Y. (Aaron Jaffee and Hubert M. Cunniffe, New York, N.Y.; Jerome Karp, Brooklyn, N.Y., on the brief), *for Appellants.*

ROBERT CLAREY, Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York; L. Kevin Sheridan, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

Appellants John Kiffer, James Kehoe and Robert Harmash mount a broadside attack on the constitutionality of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Act"), 21 U.S.C. § 801 et seq., as it applies to marihuana. Appellants were arrested in December 1971, while in possession of approximately two tons of marihuana stored in a warehouse, part of which Kiffer was in the process of delivering by truck to a police informant. All three were indicted for possession of marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and conspiracy, in violation of 21 U.S.C. § 846. They were tried in October 1972 before Judge Leo F. Rayfiel and a jury in the United States District Court for the Eastern District of New York. Kiffer and Harmash were convicted on both counts, and Kehoe was convicted on the possession count.[1]

Appellants make two claims—that the criminalization of marihuana is unconstitutional and that, even if this is not so, the classification of marihuana as a Schedule I controlled substance, 21 U.S.C. § 812(c)(c)(10), is irrational and arbitrary. As indicated below, the first issue is not before us in the broad form presented. What is before us is the question whether there is a constitutional right to sell marihuana in large quantities, obviously for profit.

1 Harmash was sentenced to three and a half years in prison, Kiffer to three years, and Kehoe to two and a half years. In addition, each received a special parole term of three years and was fined $2,500.

As to that, we answer no. As to appellants' second argument, we hold that Congress has not acted irrationally. For these reasons, we affirm the judgments of conviction.

I

Before considering the merits of the constitutional arguments, we must deal with a preliminary question. The Government urges that appellants be precluded from challenging either the inclusion of marihuana under the Act or its Schedule I classification because they have failed to exhaust an available administrative remedy.

The remedy adverted to is a procedural feature of the Act added, presumably in part, because the state of scientific knowledge regarding the effects of many of the substances controlled is far from definitive. The Act covers a large number of substances, each of which is assigned to one of five schedules; this statutory classification determines the severity of possible criminal penalties as well as the type of controls imposed.[2] However, under section 811 of Title 21, the Attorney General is empowered to add substances to, or remove substances from, the coverage of the Act, as well as to transfer substances between schedules, all based upon findings that the statutory criteria warrant such modification.[3] Proceedings preliminary to such changes "may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary [of Health, Education, and Welfare], or (3) on

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2 For further discussion of the schedules, see Part III infra.

3 Section 811(c) lists eight factors that should be considered in deciding whether to control, decontrol, or transfer a substance. Like the criteria in § 812 governing the classification of the controlled substance, see note 14 infra and accompanying text, these principally concern possible dangers and current knowledge of the effects of the substance. See H.R. Report No. 91-1444, 91st Cong., 2d Sess., U.S. Code Cong. & Admin. News 4602-03 (1970).

the petition of any interested party." 21 U.S.C. § 811(a). See 21 C.F.R. §§ 308.41-.48. Prior to such a proceeding, the Attorney General is required to obtain an evaluation from the Secretary of Health, Education, and Welfare (HEW), whose recommendations as to "scientific and medical" questions are binding upon the Attorney General. 21 U.S.C. § 811(b). Thus, if new information indicates that the original classification was incorrect or is no longer justified under the statutory criteria, an interested party can, at least in theory, seek a reconsideration of the coverage or classification. Citing the expertise of the Attorney General and of HEW and the need for effective enforcement of the drug laws, the Government stresses that appellants have not used this imposing corrective mechanism; the Government urges that appellants should therefore be estopped from attacking either the constitutionality of including marihuana as a controlled substance at all or the reasonableness of its classification in Schedule I.

We put to one side the obvious rejoinder that the administrative agency (here HEW and the Attorney General acting in concert) does not have the power to declare the Act unconstitutional. Whatever weight such an argument might have in the usual case, timely and successful use of this administrative remedy would have obtained for appellants the very relief they seek from us—a declaration either that marihuana should not be subject to the Act or that it should be covered only in another schedule carrying lesser penalties.

Nevertheless, we reject the Government's argument for two reasons. First, there is some doubt whether appellants in fact have an administrative remedy at the present time. The procedures just described for controlling and classifying must be read in conjunction with 21 U.S.C. § 811(d), which applies to any substance that the Single

Convention on Narcotic Drugs, March 30, 1961 [1967] 18 UST 1407, T.I.A.S. No. 6298 (ratified by United States in 1967), requires to be controlled.[4] The Director of the Bureau of Narcotics and Dangerous Drugs—the Attorney General's designated agent for this purpose, 28 C.F.R. § 0.100—has taken the position that marihuana is covered by the Convention, see 18 UST at 1410-11, 1559; as a consequence, he has refused to reconsider the marihuana classification pursuant to a petition of an interested party. 37 Fed. Reg. 18097-98 (1972), appeal pending sub nom. *National Organization for the Reform of Marijuana Laws* v. *Ingersoll,* Civil No. 72-1854 (D.C. Cir.). Petitioners in that case are vigorously asserting that the Director is in error. We take no position as to that, but it appears now that the administrative route for these appellants would at best provide an uncertain and indefinitely delayed remedy. Second, even assuming the existence of a viable administrative remedy, application of the exhaustion doctrine to criminal cases is generally not favored because of "the severe burden" it imposes on defendants. *McKart* v. *United States,* 395 U.S. 185, 197 (1969). The burden would be particularly harsh in this case, as appellants' remedy is now so uncertain.

Having disposed of this preliminary question, we turn to the arguments addressed to the constitutionality of the statute.

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4 Section 811(d) provides:

> If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

See H.R. Report, supra note 3, at 4603; 21 U.S.C. § 812(b).

II

Any court asked to undertake review of the multifarious political, economic and social considerations that usually underlie legislative prohibitory policy should do so with caution and restraint. In this case, the challenged legislation incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America. Indeed, as a recent perceptive study suggests, "Marijuana, in fact, has become the symbol of a host of major conflicts in our society, each of which exacerbates any attempt at a rational solution to the problem." J. Kaplan, Marijuana—The New Prohibtion 3 (1970). This should serve as a reminder that in most instances the resolution of such sensitive issues is best left to the other branches of government.

Reflecting this judgment, courts usually review challenged legislative acts with the understanding that they are presumed valid and will be so found unless it is shown that the statute in question bears no rational relationship to a legitimate legislative purpose. E.g., *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 485-88 (1955); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-54 (1938). The only cases that require a stricter standard of review are those that involve an infringement of a right explicitly enunciated in the Constitution or otherwise recognized as fundamental. E.g., *Roe* v. *Wade*, 41 U.S.L.W. 4213, 4226-29 (U.S. Jan. 22, 1973); *Griswold* v. *Connecticut*, 381 U.S. 479, 482-86 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-14 (1964). See *United States* v. *Carolene Products Co.*, supra, 304 U.S. at 152-53 n.4.

To invoke this stricter scrutiny in this case, appellants assert the existence of a fundamental "right of the individual to control of his own body and to indulge in private in what may be condemned in public or deemed immoral

or unacceptable to society at large." In support of this proposition they cite the Supreme Court decisions in *Griswold* v. *Connecticut*, supra, and *Stanley* v. *Georgia*, 394 U.S. 557 (1969), respectively invalidating convictions for use of contraceptives and for private possession of obscene materials. These cases are of little assistance to appellants. Whatever may be the merits of a claim to a protected right by one who is prosecuted for the private possession or use of marijuana, appellants are not in that position. They stand convicted, not of simple possession or use of marihuana, see 21 U.S.C. § 844(a), but rather of possession of two tons of it with intent to distribute, and of conspiracy to do so. Thus, analogies to the holdings of *Griswold* and *Stanley* are inappropriate. Far more comparable are those decisions holding that, notwithstanding *Stanley*'s protection of the ultimate consumer of obscene material, the Government may prohibit the commercial importation or mail distribution of pornography. See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971); *United States* v. *Reidel*, 402 U.S. 351 (1971).

Since there is no colorable claim of a fundamental constitutional right to sell marihuana—even partisans of the old economic due process analysis might blush at that notion—appellants must establish that prohibition of commercial distribution of marihuana lacks any reasoned justification. They have not succeeded in doing so.

Appellants rely principally on the testimony of Dr. Lester Grinspoon, an associate clinical professor of psychiatry at Harvard Medical School and specialist in psychoactive drugs. Dr. Grinspoon testified at a post-trial hearing before Judge Rayfiel on the question of the constitutionality of the marihuana prohibition.[5] In addition, it was stipu-

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5 The hearing and Dr. Grinspoon's testimony were also directed to appellants' alternative argument that the statutory classification of marihuana under 21 U.S.C. § 812 as a Schedule I drug is unreasonable. See Part III infra.

lated that five other experts[6] would have supported Dr. Grinspoon's conclusions, which were, in brief, that marihuana is neither physically nor psychologically harmful to most users and not particularly susceptible of abuse, and that those few who might suffer ill-effects through over-indulgence probably have personality disorders that would lead them to abusive use of whatever drugs they might succeed in obtaining.

In response, the Government submitted an affidavit of Dr. Forrest Tennant of the Department of Psychiatry of the School of Medicine, University of California at Los Angeles, who reported that use of high-grade marihuana by volunteers in a study in which he is engaged "often" induces psychotic episodes. Dr. Tennant recommended against legalization at the present time. While acknowledging the need for reform of the present marihuana laws, Dr. Tennant indicated that legalization would be inappropriate until (1) an easily applied blood or urine test is developed to detect intoxicated drivers,[7] (2) more is learned about the differences between marihuana and hashish, and (3) a system of controls is established to keep marihuana and other harmful substances out of the possession of minors.

On this limited record we are certainly not prepared to conclude that Congress could not reasonably decide that legalized commercial distribution of marihuana would pose a threat to the health of the American public. Moreover,

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6 Three were identified as physicians associated with medical schools, one as a sociologist, and one as a professor of law. The latter is Professor John Kaplan of Stanford Law School, author of Marijuana—The New Prohibition, which is cited in the text of this opinion.

7 The results of the most recent studies concerning the effect of marihuana on driving ability are briefly summarized in Drug Use in America: Problems in Perspective, Second Report of the National Commission on Marihuana and Drug Abuse 184-85 (1973). These studies appear to support Dr. Tennant's concern about this matter.

recent discussions of this issue suggest that the present state of knowledge of the effects of marihuana is still incomplete and marked by much disagreement and controversy. Compare, e.g., Bartimo, Marijuana, 30 Fed. B.J. 343 (1971), with Trachtenberg & Paper, Marijuana: A Further View, 31 Fed. B.J. 258 (1972). Thus, although it is apparently generally accepted that most users do not suffer any significant ongoing harm, at least some—perhaps predisposed to such episodes—are reported to suffer severe temporary trauma, as Dr. Tennant reported in this case. See Marihuana: A Signal of Misunderstanding, The Official Report of the National Commission on Marihuana and Drug Abuse 72 (Bantam ed. 1972); Bartimo, supra, at 344-45, 347-48. Moreover, the long-term physical and psychological effects are as yet unclear. Thus, in testifying before Judge Rayfiel, Dr. Grinspoon acknowledged that a recent article in a British medical journal had "asserted that marijuana led to brain damage." Although Dr. Grinspoon indicated that this "was not a credible article," he agreed that "the effect of marijuana regarding brain damage is not known." Similarly, the first report of the National Commission on Marihuana and Drug Abuse (the Shafer Commission), referred to above, upon which appellants heavily rely, stated:

> The Commission reemphasizes its concern about the small minority of heavy, long-term marihuana users who are exposed to a much greater relative risk of impaired general functioning in contemporary America. . . .
>
> . . . we must state that a significant increase in the at-risk population could convert what is now a minor public health concern in this country to one of major proportions.[8]

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8 Marihuana: A Signal of Misunderstanding, supra, at 113.

See J. Kaplan, supra, at 156, 180-83; Bartimo, supra, at 345-46.[9] It is true that the rationale for the criminalization of marihuana has shifted over time. See Bonnie & Whitebread, supra note 9, at 1012-16, 1055-57, 1061-62, 1071-74, 1126-27, 1162 (first explained, inter alia, by fear that drug would induce violent criminal conduct, insanity and even death, then by concern that it would serve as a stepping stone to harder drugs, and finally by apprehension as to its short- and long-term physical and psychologicial effects). This, however, does not negate the possibility that the justification now principally relied upon may have some merit.[10]

An argument might perhaps be made that in the absence of compelling justification, the police power does not extend so far as to permit the Government to protect an individual against himself and that the concern for public health and safety is relevant only insofar as the actions of one individual may threaten the well-being of others. See id. at 1149-55. While such an analysis would bring into question the prohibition against private possession and use of marihuana, see, e.g., *People* v. *Sinclair*, 387 Mich. 91, ——, 194 N.W.2d 878, 895-96 (1972) (opinion of Kav-

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9 The absence of hard evidence of long-term ill effects is not necessarily a result of there not being any, but may simply reflect the practical obstacles to controlled scientific observation and measurement. See J. Kaplan, supra, at 156; Bonnie & Whitebread, The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition, 56 Va. L. Rev. 971, 1102-04 (1970).

10 One observer has pointed out, in regard to the question of whether marihuana is safe enough to justify legalization:

> How much scientific evidence should be required before a drug is considered harmless is an open question. Popular standards seem to vary with the drug being considered. Some people, who on the basis of scant evidence have satisfied themselves that marijuana is relatively harmless, demand that insecticides and other mundane chemicals be subjected to strict and prolonged examination before they can be legally marketed.

Schneyer, Book Review, 24 Stan. L. Rev. 200 n.4 (1971).

anagh, C.J.), that issue is not before us.[11] In any event, such an argument does not undermine the authority of the Government to prevent some from aiding or inducing others to commit acts detrimental to their own health. The first report of the Shafer Commission accepted this very distinction. That report referred to the 1970 statute involved here and recommended that neither possession of marihuana for personal use nor casual distribution of small amounts of marihuana not for profit be an offense, although marihuana possessed in public would remain contraband subject to summary seizure and forfeiture. But the report made absolutely clear that these were the "only . . . changes in federal law" recommended. See Marihuana: A Signal of Misunderstanding, supra, at 191. This dual approach to the control of marihuana has since been reaffirmed by the Shafer Commission in its second and final report, Drug Use in America: Problem in Perspective, supra note 7, at 224-25. See also J. Kaplan, supra, at 315-30.[12]

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11 The constitutionality of laws prohibiting the possession of marihuana for personal use has been the subject of a number of recent judicial opinions. See, e.g., *United States* v. *Drotar*, 416 F.2d 914 (5th Cir. 1969), vacated on other grounds, 402 U.S. 939 (1971); *Commonwealth* v. *Leis*, 355 Mass. 189, 243 N.E.2d 898 (1969) (both upholding such laws); *People* v. *Sinclair*, supra (law held invalid, though no consensus as to grounds; opinions suggest, inter alia, cruel and unusual punishment, irrational classification and invasion of personal liberty); *State* v. *Kantner*, —— Haw. ——, 493 P.2d 306, cert. denied, 409 U.S. 948 (1972) (law upheld, but dictum in concurring opinion that "right to the 'enjoyment of life, liberty and the pursuit of happiness' includes smoking of marijuana," id. at 312; dissenting opinions assert criminalization violates due process and right of privacy). We intimate no view as to whether an argument of unconstitutionality advanced by a defendant charged with private possession would require stricter scrutiny than here applied or yield a different result. For a thoughtful discussion of this issue, see Bonnie & Whitebread, supra note 9, at 1125-55. See also Drug Use in America: Problem in Perspective, supra note 7, at 247-49.

12 For approval of the distinction proposed by the Shafer Commission between continued prohibition of commercial distribution and legalization of possession for personal use, see Buckley, The Spirit of the

Appellants also argue that marihuana is much less harmful than tobacco and alcohol; the legal availability of the latter substances, they say, proves the irrationality of singling out marihuana for criminal penalties. Our knowledge is not sufficient for us to accept or reject appellants' initial premise. But even if it is correct, see J. Kaplan, supra, at 263-310 (as to alcohol), this does not render the statute here unconstitutional. If Congress decides to regulate or prohibit some harmful substances, it is not thereby constitutionally compelled to regulate or prohibit all. It may conclude that half a loaf is better than none. See *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809-11 (1969); *Williamson* v. *Lee Optical, Inc.*, supra, 348 U.S. at 489.

In sum, although one cannot read the thorough first report of the Shafer Commission without agreeing that there is an "extensive degree of misinformation about marihuana as a drug" and a need, in the words of the Report, to "demythologize" and to "desymbolize" it,[13] the question before us is a narrow one. It is whether it can fairly be said that Congress acted irrationally in prohibiting the commercial distribution of marihuana. We believe that the answer to that question is no. Therefore, appellants' constitutional attack upon that portion of the statute must fail. Accord, *United States* v. *Rodriquez-Camacho*, 468 F.2d 1220 (9th Cir. 1972).

Law, XXIV National Review 1348 (1972). It is noteworthy that the Act itself distinguishes between commercial possession or distribution of marihuana on the one hand and possession for personal use or gratuitous transfers of small amounts on the other. Persons who are convicted of possession without intent to distribute or of distribution of a small amount without remuneration are subject to a prison term of up to one year and a maximum fine of $5,000. 21 U.S.C. §§ 841(b)(4), 844(a). In contrast, commercial possession and distribution are punishable by imprisonment for as much as five years and a maximum fine of $15,000. 21 U.S.C. § 841(b)(1)(B).

13 Marihuana: A Signal of Misunderstanding, supra, at 210.

III

Appellants' second argument is that the statutory assignment of marihuana to Schedule I, together with such concededly dangerous narcotic drugs as heroin, is arbitrary and unreasonable in light of the criteria for classification established by the statute and what is known about the effects of these substances.

As already noted, the Act established a series of five schedules and listed a number of criteria based upon which the various controlled substances were each assigned by Congress to one of the schedules. See 21 U.S.C. § 812. The criteria concern potential for abuse, currently accepted medical uses, and possible physical or psychological dependency effects.[14] The severity of the statutory sanctions for drug distribution and related offenses is regulated by the schedule in which the drug in question is found, with the most severe penalties attaching to Schedule I and II drugs and the least severe to those in Schedule V. 21 U.S.C. § 841(b).

Appellants attack their sentences as the product of an irrational system of drug classification. They assert that the statutory penalties are not justified because scientific evidence shows that marihuana is not nearly as dangerous as heroin, and they suggest that marihuana should be classified, if anywhere, in Schedule V.[15]

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14 Thus, for example, the criteria for Schedule I are:

> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b)(1).

15 Thus, appellants argue that marihuana is less harmful than barbiturates, which are listed in Schedule IV. See, e.g., *People* v. *McCabe*, 49 Ill. 2d 338, ——, 275 N.E.2d 407, 411 (1971) (per curiam). This

Congress listed marihuana in Schedule I principally on the recommendation of HEW, which urged "that marijuana be retained within Schedule I at least until the completion of certain studies now underway to" determine the physical and psychological dependency effects of the drug. See H.R. Report, supra note 3, at 4579, 4629-30. Apparently the potential for abuse and the absence of significant medical value were the determining grounds for placement of marihuana in the first schedule. See 116 Cong. Rec. 797 (daily ed. Jan. 28, 1970) (remarks of Sen. Hruska). Although we are in no position at this time and on this record to determine whether marihuana would be listed most appropriately where it is or in some other category, we can conclude that the current statutory arrangement is not so unreasonable or arbitrary as to endanger the validity of the sentences imposed on appellants.[16]

The reasonableness of the provisions in question is grounded on two considerations. As indicated in Part II of this opinion, there is a body of scientific opinion that marihuana is subject to serious abuse in some cases, and relatively little is known about its long-term effects. Congress was advised by HEW that determination of the seriousness of these potential hazards would require further study, and in the meantime Congress was certainly not precluded from taking a cautious approach. It is appar-

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reasoning may be persuasive, but it is not undisputed. See "Marijuana and Society," statement by the Council on Mental Health and the Committee on Alcoholism and Drug Dependence of the American Medical Association, quoted in J. Kaplan, supra, at 187 (cannabis found to be more potent than the barbiturates).

16 Appellants do not suggest that their sentences violate the constitutional guarantee against cruel and unusual punishment. See, e.g., *United States* v. *Lozaw*, 427 F.2d 911, 917 (2d Cir. 1970). But cf. *People* v. *Sinclair*, supra, 387 Mich. at ——, 194 N.W.2d at 895, 904-06 (opinions of Kavanagh, C. J., & Brennan, J.).

ently true that there is little or no basis for concluding that marihuana is as dangerous a substance as some of the other drugs included in Schedule I. But the focus of appellants' attack is on the penalty provisions accompanying the schedule, and in this respect Congress has made a significant distinction. The penalties for possession of a Schedule I substance with intent to distribute differ substantially depending upon whether the substance in question is classified as a narcotic drug. Marihuana is not so classified. See 21 U.S.C. §§ 802(16), 812(c)(c)(10). Consequently, the maximum penalty for possession of it with the requisite intent is five years in prison and a $15,000 fine, compared with a possible 15-year sentence and $25,000 fine for possession of such Schedule I and II drugs and heroin and cocaine. See 21 U.S.C. §§ 841(b)(1)(A), (B).

In view of these disparities in the statutory sanctions and the ongoing dispute regarding the potential effects of marihuana, we cannot say that its placement in Schedule I is so arbitrary or unreasonable as to render it unconstitutional. Moreover, a final observation is appropriate. The provisions of the Act allowing periodic review of the control and classification of allegedly dangerous substances create a sensible mechanism for dealing with a field in which factual claims are conflicting and the state of scientific knowledge is still growing. The question whether a substance belongs in one schedule rather than another clearly calls for fine distinctions, but the statutory procedure at least offers the means for producing a thorough factual record upon which to base an informed judgment. True, the position taken thus far by the Attorney General's designate (the propriety of which is now being litigated), see Part I supra, has halted this procedure at the outset for marihuana. But the very existence of the statutory scheme indicates that, in dealing with this aspect of

the "drug" problem, Congress intended flexibility and receptivity to the latest scientific information to be the hallmarks of its approach. This, while not necessary to the decision here, is the very antithesis of the irrationality appellants attribute to Congress.

Judgments of conviction affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1700

ROBERT V. HARMASH AND
JAMES P. KEHOE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 72-1730

JOHN C. KIFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the prohibition against commercial distribution of marijuana set forth in 21 U.S.C. 841(a)(1) is unconstitutional and alternatively that the classification of marijuana as a Schedule I controlled substance, 21 U.S.C. 812(b), is arbitrary and capricious.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

Petitioners Kiffer and Harmash were also convicted of conspiracy to possess and distribute marijuana, in violation of 21 U.S.C. 841 and 846. Harmash was sentenced to three and one half years' imprisonment, Kiffer to three years, and Kehoe to two and one half years. All received, in addition, a fine of $2,500 dollars and a special parole term of three years. The court of appeals affirmed (Pets. Apps.) on April 18, 1973. The petition in No. 72-1730 was filed on June 21, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no cause for further review.

Petitioners were arrested on December 1, 1971, in Queens County, New York, by agents of the Bureau of Narcotics and Dangerous Drugs. They were found in a warehouse in which approximately two tons of marijuana was stored. Petitioners do not question the sufficiency of the evidence to support their convictions.

Following their trial in October 1972, a post-conviction hearing was held to determine the constitutionality of those sections of the statute which make criminal the possession of marijuana with the intent to distribute it.[1] During the hearing, petitioners introduced scientific evidence in support of the contention that there is no rational basis for the inclusion of marijuana among the schedules of illicit drugs contained in 21 U.S.C. 801 *et seq.* and that there is, in any event, no rational

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[1] The court of appeals correctly noted that this case does not present the broad question of the constitutionality of the criminalization of marijuana, but rather the question of the constitutional right to sell marijuana in large quantities for profit (Kiffer Pet. App., p. 2908).

basis for including marijuana as a Schedule I drug along with heroin, the opiates and L.S.D. These contentions are fully discussed and properly rejected by the court below, on whose opinion we rely in urging that the petitions for certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

[001-1973-08